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In The Supreme Court of The United States

OCTOBER TERM 1965

EDGAR W. DICKENSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY AND RULE PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING WRIT	10
APPENDIX A	17
APPENDIX B	31

TABLE OF AUTHORITIES CITED

Page

CASES

Mitchell v. Lublin, McGaughy and Associates, 358 U.S. 207 (1959), 36 LC 65, 149 . . . . . 10, 11

CONSTITUTION

Constitution of the United States, 5th Amendment 2, 5, 13

REGULATIONS

29 U.S.C. 201, et seq. 2

29 U.S.C.,

Sec. 203, subdivision (b) 2
subdivision (h) 2
subdivision (i) 2
subdivision (j) 2
subdivision (k) 2
subdivision (n) 2
Sec. 206 (a) 12, 13
(b) 2

Sec. 207 (a) 12, 13
(a) (1) 2
(a) (2) 2
Sec. 211 (b) 2
(c) 2, 4
(d) 2

Sec. 213 (a) (2) 2, 4, 14, 15

TABLE OF AUTHORITIES CITED (Continued)

	Page
REGULATIONS	
29 U.S.C.	
Sec. 215 (a) (1)	2, 5
(a) (2)	2, 5
(a) (5)	2, 4, 5
Sec. 216 (a)	2, 4, 5
26 Code of Federal Regulations, Part 516, Chapter V, Section 516.2 (b) (2)	2
29 Code of Federal Regulations, Part 776, Labor, Chapter V,	
Sec. 776.2	2, 3
776.3	2, 3, 12

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No. _____

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit entered November 18, 1965, has not yet been reported and is attached as Appendix A, infra, pp. 17-30.

JURISDICTION

The judgment of the United States Court of Appeals, Ninth Circuit, was entered on November 18, 1965. (Clerk's Transcript page 93.) A petition for rehearing, timely filed, was denied on January 6, 1966. (Clerk's Transcript page 94.) The jurisdiction of this Court is invoked under 28 U.S. Code Section 1254(1), 28 U.S. Code Section 2106.

CONSTITUTIONAL AND STATUTORY AND RULE PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States.

2. The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 et seq., specifically:

Section 203, subdivisions (b), (h), (i), (j), (k), (n); Section 206 (a)(1), (b); Section 207 (a)(1), (a)(2); Section 211 (b), (c), (d); Section 213 (a)(2); Section 215 (a)(1), (a)(2), (a)(5); Section 216 (a).

3. Title 29 Code of Federal Regulations, Part 776, Labor, Chapter V, Secs. 776.2, 776.3.

Title 26 Code of Federal Regulations, Part 516, Chapter V, Section 516.2 (b)(2).

The provisions of all of the above sections are set forth in Appendix B.

QUESTIONS PRESENTED

1. In a criminal prosecution under the Fair Labor Standards Act of a small local retail employer who is engaged in the retail sale of used and new auto parts over the counter and whose only activity which would cause his employees to be covered by the Act is the incidental sales, sporadically, of very small amounts (.003% to.001% of total sales) of scrap metal to dealers who subsequently ship it in foreign commerce, the following questions are raised:

(a) As a matter of law, is the sale of such a small amount of scrap metal sufficient to constitute "coverage" under the Act?

(b) Since Title 29 Code of Federal Regulations, Part 776, Chapter V, Sections 776.2 and 776.3, provides that the work week is the time measure of the employees activity, is it incumbent on the Government to prove that the employee was engaged (1) in "covered activity" (2) during a specific week (3) and while so engaged he was not paid in accordance with the Act?

(c) Where the information alleges that the violations occurred from August 12, 1959 to August 12, 1961, and fails to specify the particular work weeks claimed to have been violated, is it defective as a matter of law?

2. Is the question of "coverage" under the Fair Labor Standards Act a matter of law for the court to decide, or a question of fact for the jury?

3. Assuming "coverage" under the Act, is petitioner

exempt from the application of the Act under Section 13 (a) (2) as a matter of law, where it was stipulated that more than 50% of his annual dollar volume of sales was made within the State and where the uncontradicted evidence showed that at least 75% of his annual dollar volume of sales was not for resale and that such sales were recognized as retail sales in the industry?

4. In a criminal prosecution does the language of Title 29 U.S.C. Section 13(a) (2) meet the required standard of certainty under the "Due Process" clause of the Fifth Amendment of the United States Constitution?

5. As to Count One of the Information: (assuming coverage and no exemption)

(a) Can there be a violation of 29 U.S.C. Section 215(a) (5) and 216 (a) where the employer files an official receipt from under 29 U.S.C. Section 211 (c) signed by the employee involved, where the employer has taken bona fide setoffs due from the employee?

(b) In the absence of any statute or regulation prohibiting such a setoff, is the unpublished office policy of the Secretary of Labor prohibiting such setoffs sufficient to give proper notice to the employer that he would violate 29 U.S.C. Section 211 (c) as required by the "Due Process" clause of the Fifth Amendment of the United States Constitution?

STATEMENT OF THE CASE

Petitioner, a retail dealer in new and used auto parts, was charged by an information with six counts of

violating the Fair Labor Standards Act of 1938, as amended, specifically violating 29 U.S.C. Sections 215 (a) (1), 215 (a) (2), 215 (a) (5), and 216 (a).

Petitioner was found guilty on all six counts and fined $12,000.00 of which $8,000.00 was suspended.

The counts are summarized as follows:

1. Count One charged that Dickenson filed with the Wage and Hour Administrator false receipt forms with respect to wages due workers Madrigal, Roberts and Martinez. In a stipulated civil contempt decree, Dickenson had previously agreed to certain amounts due the three laborers.

2. Count Two charged that Dickenson, between August 12, 1959, and August 12, 1961, did pay less than $1.00 an hour to employees Cesena, Martinez, Rubalcava and Zertuche for work.

3. Count Three charged that he worked the same four employees over 40 hours a week during the same period mentioned in Count Two without paying them $1.50 per hour for overtime.

4. Count Four charged that for the same period he kept false records showing that the four employees named in Count Two worked less hours than they actually worked.

5. Count Five for the same period, charged that he failed to make, keep and preserve records for the various weeks of the period.

6. Count Six charged that during the same period Dickenson transported, offered for transportation, or sold into "commerce" automobile parts and scrap on which employees had worked without having received the wages required under the Act.

The facts common to all counts are as follows:

Petitioner is a retail dealer in used and new auto parts. All of petitioner's sales are made at his place of business, over the counter at San Diego, California. The great majority of his business is the retail sale of used auto parts. More than 75% of his sales were retail sales to individual local car owners for their own use and not for resale. Less than 25% of his business consisted of retail sales to businesses or individuals possessing resale tax licenses, the majority of whom were local filling stations who used the parts either on their own cars or on cars being repaied in their station. Petitioner had no outside salesmen and did not ship any parts in interstate and foreign commerce.

In addition to petitioner's wife working at the business, petitioner hired several employees from time to time. At any one time there were usually three regular employees and occasionally, at certain seasons of the year, four or five more. To obtain the used parts for sale petitioner would buy wrecked and old cars and strip them as the parts might be needed. When the cars were stripped of their usable parts, junk remained which, when a sufficient amount had accumulated, was sold to a scrap metal dealer in San Diego. Such scrap sales were made for the purpose of making room for other wrecked and old cars. It is the sale of this scrap metal that is the foundation of the Government's claim

that petitioner's employees were covered by the Fair Labor Standards Act.

FACTS AS TO COUNT ONE:

In 1959 petitioner consented to a civil decree ordering him to pay three employees certain monies as past due wages in a civil suit by the Government. The suit was based on alleged violation of the Fair Labor Standards Act. He had previously been enjoined in 1956.

The three employees testified that although they had signed official Government receipt forms acknowledging payment pursuant to the contempt decree, petitioner had not in fact paid them. The evidence showed that petitioner had certain valid setoffs against the three employees and had paid them the difference between the wages due and the amounts owed to him by way of setoff. The Government claimed this did not constitute compliance with the Act and therefore the receipt was false.

There is no provision in the Fair Labor Standards Act concerning the right of employers to setoff from wages due employees monies owed to said employer, nor is there any regulation of the Department of Labor regarding this matter. The only evidence at the trial was testimony of an agent of the Wage and Hour Division of the Labor Department that it was the policy of the Department not to allow employers to setoff monies owed by the employee; the policy of the Department being that the employer must pay the entire wage due the employee and then ask the employee to return any money owed.

The civil contempt adjudged in 1959 was based on violations for the years 1957 and 1958. Petitioner

proved that, even though he had consented to the civil decree in 1956, the same was a nullity as a matter of law since his employees were not covered by the Act and the court lacked jurisdiction to enter such a decree, or, if covered, petitioner was exempt by the Act. Petitioner further showed that for the year 1957 his retail sales were 75.9% of his gross sales, were not for resale, and recognized as such in the industry; and for the year 1958 said sales were 79.1% of his gross sales, thus entitling him to the exemption allowed by Section 213 (a) of the Act. Petitioner further showed that the activities of the three employees in said Count were based wholly on intrastate commerce.

FACTS AS TO COUNTS TWO THROUGH SIX:

The sales of scrap metal during the years involved in these counts, in relation to his gross sales, were as follows:

Year	Gross Sales	Scrap Sales	Percentage of Scrap Sales to Gross Sales
1959	$ 92,657.36	$ 284.41	0.003%
1960	78,820.04	118.95	0.001%
1961	85,330.20	84.65	0.001%

The evidence showed that petitioner kept time records on his employees and although the time records were signed they testified they worked longer hours than were recorded and signed by them and were not paid for such unrecorded hours. The Government, therefore, claimed that petitioner was guilty of failure to pay the prescribed minimum wage, failing to pay the prescribed overtime wages, and failed to keep correct records.

Employee Cesena testified he worked from March, 1960 to October,1960. His work consisted of putting stock away and waiting on customers at the counter. Sometimes he would load scrap metal onto petitioner's truck.

Employee Zertuche worked from October, 1960 to April, 1961, his principal job was that of a salesman, a mechanic's helper and deliveryman. From time to time he would drive the truck with the scrap metal to the scrap dealer.

Employee Rubalcava worked from July, 1960 to July, 1961. His duty was repairing auto transmissions. For a two month's period he slept on the premises and considered himself a watchman.

Employee Martinez worked from March, 1958 to June, 1958 and again from November, 1959 to December, 1960. He was a manager's helper and worked in the store. He also stripped autos and, from time to time, would drive the truck to deliver the scrap metal to the scrap dealer.

More than fifty per cent (50%) of petitioner's sales were made within California, and more than seventy-five per cent (75%) of his annual volume of sales was not for resale, and was recognized as a retail sale in the particular industry.

Both the District Court and the Court of Appeals held that whether the petitioner's scrap sales put him in interstate commerce was a question for the jury to decide

Petitioner contends that he was not engaged in interstate commerce as a matter of law.

The District Court and the Court of Appeals held, with respect to the exemption, that even though the only evidence showed that petitioner was within the exemption, the jury could ignore such evidence (it necessarily having to be introduced by petitioner) and find that petitioner did not come within the exemption. Petitioner contends that the evidence showed as a matter of law he was within the exemption.

REASONS FOR GRANTING THE WRIT

1. The meaning of "coverage and the right to the "retail exemption" under the Fair Labor Standards Act has never been defined in any Federal decision based on a criminal proceeding involving a small retail intra state business. This Court, in the case of Mitchell v. Lublin, McGaughy and Associates, 358 U.S. 207 (1959), 36 LC 65, 149, in discussing the question of "coverage" under the Act, said:

> ".... we focus on the activity of the employees and not on the business of the employer...."

To determine whether the employees are engaged in commerce, the Court established the following test:

> "The test is... whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part

of it, rather than isolated, local activity." (Emphasis added.)

The decision of the Court of Appeals is in direct conflict with the test established by this Court in the Mitchell case. How can it be said that the activities of the named employees "so directly and vitally" related to interstate commerce so as to be "in practical effect a part of it" where the total dollar volume of scrap involved here was so small as to be di minimus and the relationship to interstate commerce was indirect, to wit, the scrap was sold to junk dealers who intermingled it with other scrap and then sold part of such intermingled scrap into interstate commerce, and the employee's activity allegedly covered by the Act consisted of taking the scrap from the retailer to the junk dealer The total scrap dollar volume is as follows:

For 1959 $285.25 or .003% of gross sales of $92,941.77
For 1960 $145.95 or .001% of gross sales of $78,938.99
For 1961 $ 84.65 or .001% of gross sales of $84,414.85

It would appear self evident that the activities of the employer as to commerce would necessarily be isolated and their activity would not "directly and vitally" relate to interstate commerce so as to be "in practical effect a part of it."

Congress, itself, in setting forth those businesses exempt from the Act because of the small amount of its sales going into interstate commerce under Section 13 (a) (2) of the Act, established a di minimus standard which cannot be overlooked in determining coverage.

Some standard must be established to enable the

small, marginal business to know with some degree of certainty whether their employees are engaged in activities under the Fair Labor Standards Act from which criminal penalties flow.

2. It was not the intent of Congress to cover every business engaged solely in intrastate activities, nor to cover isolated and sporadic activities of an employee of an intrastate employer even though incidentally the activity resulted in an infinitesimal amount of goods ultimately reaching interstate or foreign commerce. See Title 29, Code of Federal Regulations, Part 776, Labor, Chapter V Section 776.3, Appendix B, page 38.

Where the uncontradicted facts show that the amount of sales of scrap metal was so small as to be di minimus, the Court should determine as a matter of law that the activities of the employees were not covered by the Act.

3. The decision of the Court of Appeals is in direct conflict with the long standing principle that the Government, in a criminal case, must meet its burden of proof beyond a reasonable doubt. The decision has the effect of shifting the burden of proof as to the material elements of the crime to the defendant.

The Act (Section 6 (a) and 7 (a)) and regulations promulgated by the Secretary of Labor establish the time measure of the employees' activities as being the "work week", Title 29 Code of Federal Regulations, part 776, Chapter V, Section 776.2 and 776.3. Thus it would be mandatory in a criminal case that the Government prove with some degree of certainty that during a particular work week the named employer was engaged in commerce or the production of goods for commerce

and during that specific work week the employer failed to pay in accordance with Sections 206(a) or 207 (a) of the Act.

A blanket charge as set forth in the information that "during the period beginning August 12, 1959 and ending August 12, 1961 the employer paid wages less than $1.00 per hour and had not paid time and one-half for work weeks longer than 40 hours" without proof as to any particular work week in the entire period, places such an ominous burden upon a defendant in a criminal case so as to result in conviction by the use of shotgun type evidence contrary to the due process clause.

There was no evidence offered that during a specific work week an employee named in the information worked on covered activities and was not properly paid as provided by the Act. The named employees kept no records and could not remember dates, work weeks, or what they did during any particular work week which would bring them within the Act and for which they were not paid.

To allow a person to be convicted of a criminal offense by proving generalizations, i. e., that the employee at some time during the course of his employment, the exact day, week or month being unknown and the exact rate of pay also being unknown, delivered scrap metal from petitioner's business to the scrap dealer, when the Act requires direct proof of specific work weeks and rate of pay during the covered activity, deprives the accused of his right to due process of law under the Fifth Amendment of the United States Constitution.

4. Petitioner has been unable to find any criminal case which sets forth the standards required to establish the

exemption provided under Section 213(a) (2) of the Act.

Congress intended that certain businesses be exempt regardless of the fact that some of its employees actually engage in activities which would be covered by the Act.

Congress must have felt that the rule of de minimus be applicable where the business of the employer met the requirements of Section 213(a) (2) of the Act.

The only evidence offered on this subject was offered by the petitioner, his expert witness, Dr. Elmer Allen Hale, Ph. D. Economics and Chairman of the Marketing Department of San Diego State College, and other business men engaged in the industry, which established that:

1. 100% of petitioner's annual dollar volume of sales was made within the State of California; and

2. That at least 75% of petitioner's annual dollar volume of sales was not for resale; and

3. Such sales were recognized as retail sales in the industry.

Petitioner contended that the question of "exemption" just as the question of "coverage" was a matter of law for the Court to determine. But the trial Court, just as did the Court of Appeals, held that such question was one of fact for the jury.

The Court of Appeals said at page 3:

"It is quite obvious that Dickenson, percentage wise, was on the borderline of whether he was entitled to the retail exemption."

A reading of Section 213(a) (2) shows immediately the confusion which arises in answering the question of what are sales of goods not for resale, and what is required to show recognition by the particular industry.

The Court says:

1. The Act does not define retail.

2. That State Sales Tax Statements are not conclusive; and

3. That the jury is at liberty to completely disregard the opinion of an expert in a highly complicated and technical field, confusing not only to small businessmen but to attorneys and courts as well, and over which reasonable minds can readily disagree.

How can such a question be held to be one of fact for the jury to decide?

Respectfully submitted

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Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Edgar W. Dickenson, Jr., Appellant,	)	
vs.	)	No. 19,039
United States of America, Appellee.	)	

[Nov. 18, 1965]

On Appeal from the United States District Court
for the Southern District of California
Southern Division

Before: CHAMBERS and BARNES, Circuit Judges, and McNICHOLS, District Judge.

CHAMBERS, Circuit Judge:

Dickenson, a San Diego auto parts dealer, was convicted of six counts under an information charging him with violations of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. §201 et seq. The charges concerned payment of wages to several employees.

We summarize:

1. Count one charged that Dickenson filed with the wage and hour administrator false receipt forms with respect to wages due workers Madrigal, Roberts and Martinez. In a stipulated civil contempt decree, [1] Dickenson had previously agreed to certain amounts due the three laborers.

2. Count two charged that Dickenson, between August 12, 1959, and August 12, 1961, did pay less than a dollar an hour to employees Cesena, Martinez, Rubalcava and Zertuche for work.

3. Count three charged that he worked the same four employees over forty hours a week during the same period mentioned in count two without paying them a dollar and a half an hour for overtime. [2]

4. Count four charged that for the same period he kept false records showing that the four employees named in count two worked less hours than they actually worked.

5. Count five, for the same period, charged that he failed to make, preserve and keep records for the various weeks of the period.

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[1] Dickenson had been enjoined in 1956 from violating the Fair Labor Standards Act. Under the injunction, the civil contempt was adjudged in 1959.

[2] Count two, in effect no wages at all for overtime work, was a charge of a failure to pay the minimum wage. Count three was a failure to pay the rate for overtime wages. Thus, the government was not remiss in informing against defendant in every way it could.

6. Count six charged that during the same period Dickenson transported, offered for transportation, or sold into "commerce" automobile parts and scrap on which employees had worked without having received the wages required under the act.

Throughout the charges the element of "commerce" as defined by the act[3] was stated and repeated.

After conviction, essentially the sentence was:

1. On count one, a fine of $1,000, probation and a direction to pay the three named employees certain amounts.

2. On count two, a fine of $1,000, probation, and a direction to pay the four employees mentioned in the count certain amounts.

3. On counts three and four, the same concurrent probation already provided in counts one and two.

4. On counts five and six, a fine of $1,000 on each count.

We do not have any inconsistent verdicts here, but we do think that consistency probably required an identical finding of guilty or not guilty on all of the counts two to six inclusive. As indicated, count one had a different set of facts.

We deal here with the Fair Labor Standards Act as it existed at the time of the alleged offenses.

[3] Fair Labor Standards Act of 1938, §3(b), 52 Stat. 1060, as amended, 29 U.S.C. §203(b).

Of course, the interstate commerce clause of the Constitution has grown and grown, but the Fair Labor Standards Act, while growing from time to time in sweep, has never reached as to inclusiveness the permissible sweep on interstate and foreign commerce. Generally, the act has dealt with goods "in commerce," interstate or foreign, and not with "affecting." And it has exceptions, such as the retail one with which we must deal here.

A business may have many facets, but under the act only the interstate-foreign commerce employees come under it. [4] And such employees may be in such commerce for one pay period one week and out the next. [5] Also, if a retail business meets the percentage test imposed, there may be some interstate-foreign commerce, and the employees working in the interstate-foreign aspect may not get the wages otherwise ordered by the act.

At the time of the alleged offenses, the act required, if applicable, the payment of a dollar an hour for the first forty hours of work in a week and a dollar and a half an hour for over-time.

It is quite obvious that Dickenson, percentagewise, was on the borderline of whether he was entitled to the retail exemption.

In pertinent part, Section 13(a), the retail exemption, provided:

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[4] See, e.g., Mitchell v. H. B. Zachry Co., 362 U.S. 310, 319; Hagen v. Goldberg, 9 Cir., 291 F.2d 249.

[5] See, e.g., Guess v. Montague, 4 Cir., 140 F.2d 500, 504; Mitchell v. Owen, 6 Cir., 292 F.2d 71, 78-79.

"SEC. 13(a) The provisions of sections 6 and 7 [the amounts to be paid as a minimum] shall not apply with respect to -

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the States in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry. "

It is settled that in a civil case the government must prove the work was done in commerce (interstate or foreign) or in the production of goods for it, but then, once coverage is proved, the defendant employer must prove by a preponderance of the evidence that he was a retailer under the act, meeting the percentage tests for exemption. Arnold v. Ben Kanowski, Inc., 361 U.S. 388. Defendant acquiesced in instructions placing the same burden (by a preponderance of the evidence) upon him here.

We think the government concedes that Dickenson met the 50 per cent test, but the disagreement is over the 75 per cent test of section 13(a) supra.

As to coverage, the dollar volume of scrap sold to other dealers as "commerce" (on which the employees with whom we are concerned worked) is very, very small. The three years of scrap sales were as follows:

1959, $285.25, or 3/10 of one percent of sales;
1960, $145.95, or 1/10 of one percent of sales;
1961, $ 84.65, or 1/10 of one percent of sales.

The defendant says over and over again that this was de minimis and that he only sold the scrap (not salable as parts) to get rid of it so he could bring other old cars onto his lot to salvage parts. The government contends that not only cutting up the scrap and taking the scrap to the dealer for shipment was "commerce," but that all the acts of removing parts for sale helped prepare the ultimate product, scrap, and, ergo, this was producing goods. We do not decide that point either way, deeming it not necessary. The cases seem to stand for the proposition that one must know that there are a lot of other suppliers of scrap and probably a lot of other little ones like Dickenson, thus the whole picture is to be considered, and that a lot of little ones with underpaid wages could change the movement of goods in commerce. [6] As the case law has built up, de minimis does not mean much.

It is quite likely that Dickenson's employees named in the indictment were only engaged in the "commerce" during a few pay periods of the whole time mentioned in the information. But there again the law seems to be settled that, once shown to be in commerce, the employer's burden is to show in the pay periods thereafter that the employees were not in commerce. [7]

[6] See Mabee v. White Plains Publishing Co., 327 U.S. 178, 182; United States v. Darby, 312 U.S. 100, 123.

[7] 29 C.F.R. §776.4; see, e.g., Guess v. Montague, 4 Cir., 140 F.2d 500. There appears no reason for limiting this rule in criminal cases. Compare Southern

The defendant is convinced that his sales tax returns to the state of California, either alone or plus estimates of certain non-taxable sales, showed that clearly he had 75% of retail sales and thus the retailer's exemption took him out of coverage.

The act does not define, ipso facto, retail except to say that "it is not for resale, and is recognized as retail sales. . . in the particular industry."[8]

Obviously, a state sales tax statute would not be conclusive. But with a jury in the box to the side of the bench, the trial judge must come up with a definition. We set forth as Appendix A the trial court's definition, which we consider well done.

The defendant had an expert who looked over the business and gave his opinion of the operation and concluded the business was within the exemption. But the Advance Bag & Paper Co. v. United States, 5 Cir., 133 F.2d 449 (Government not required to show, in a criminal case, which particular pieces of pulpwood, which were made into paper, had rendered employer subject to the act); United States v. Ewald Coal Co., W.D.Ky., 67 F.Supp. 67 (failure of employer to keep accurate records created reasonable inference that employees were not properly compensated). The rule is analogous to that applicable in tax evasion cases which places upon the defendant the burden to show that he had other legitimate deductions once he is proven to be deficient in payment. See, e.g., United States v. Stayback, 3 Cir., 212 F.2d 313, cert. denied, 348 U.S. 911.

[8] Fair Labor Standards Act of 1938, §13(a)(2), 52 Stat. 1067, as amended, 29 U.S.C. §213(a)(2).

jury was free to disregard the expert. [9]

We are satisfied that under the circumstances there was a jury question as to whether the whole business of Dickenson was a retail one under the act. If it was, the employees would lose their coverage.

Assuming coverage and no exemption, there was adequate evidence to sustain the verdict on all counts.

Some particular discussion is required on count one. That involved the prior stipulated civil decree wherein Dickenson was ordered to pay amounts to Madrigal, Roberts and Martinez. Not shown on the face of the prior civil decree to pay is the fact which turned up in the criminal trial, that Dickenson claimed the three employees were indebted to him for advances for all or part of the amounts specified for overtime wages. So, he says, he insisted on "his" offsets and took receipts in full from the employees.

On count one, the court did not tell the jury that the stipulated decree in the prior civil contempt case established for all purposes or any purpose that the defendant was in non-exempt commerce and did not tell the jury that the defendant had no right to make the deductions. There is a good argument that such would have been proper. But we do not pass on it.

The court instructed the jury that the stipulated decree was an admission by Dickenson, but no attempt

[9] Other witnesses who testified just did not know enough about Dickenson's business for one to say their testimony had to be taken as conclusive. And the jury could disbelieve Dickenson.

was made to call it a conclusive admission. As instructed, the jury, as to count one, was free to find the defendant not in commerce and that the offsets not disclosed to the court in the first case actually existed, and therefore acquit him on count one. The instructions peculiarly applicable to count one were very favorable to the appellant.

On the issue of the justification of the offsets, the evidence was sharply divided. Obviously, the jury believed Dickenson spoke not the truth. Quite possibly this belief influenced the jury in appraising his testimony on the other counts.

The defendant objects to a number of instructions given and the failure to give others. We have examined all of the objections. Many of the objections now made were not made to the trial court. Therefore, our review of them is exceedinly limited in scope. Many of the objections focus too much on a small segment, overlooking that the instructions are to be taken as a whole. So taken, they are complete, good, and free from any major fault.

The judgment of conviction is affirmed.

APPENDIX A

Instruction on "retail sales" and the exemption therefor:

Now we come to this question of exemption, and that is the second matter that you should consider. First, as I say, you should consider coverage. Secondly, consider the question of exemption that is claimed by the defendant.

As I said, under the plea of not guilty as to all of the counts, the defendant contends that he is exempt from the provisions of the Act for the reason that he operates a retail establishment.

A retail establishment is defined in the Act, in Section 13(a)(2) of the Act, which provides:

> "The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 percentum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located."

There is no question about that. Both the Government and the defendant - or, rather, the Government concedes that more than 50 percent of his sales were made within California. Then it says:

> "A 'retail or service establishment' shall mean an establishment 75 percentum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;. . . "

Typically, a retail or service establishment, is one which sells goods or services to the general public. It serves the every day needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the nation, which is at the very end of the stream of distribution

disposing in small quantities of the products and skills of such organization, and does not take part in the manufacturing process. Such an establishment sells to the general public its food and drink. It sells to such public its clothing and its furniture, its automobiles, its radios and refrigerators, its coal and its lumber, and other goods, and performs incidental services on such goods when necessary. It provides the general public its repair services, and so forth. Illustrative of such establishments are: grocery stores, hardware stores, clothing stores, coal dealers, furniture stores, restaurants, hotels, watch repair establishments, barber shops, hospitals, valet shops, and other such local establishments.

If the business is one to which the retail concept is applicable, then the second requirement for qualifying as a retail or service establishment, within that term's statutory definition, is that 75 percentum of the establishment's annual dollar volume must be derived from sales of goods or services, or both, which are recognized as retail sales or services in the particular industry. In applying this requirement it must be determined whether the sales or services of an establishment are recognized as retail sales or services in the particular industry. The determination must take into consideration the well-settled habits of business, traditional understanding and common knowledge. These involve the understanding and knowledge of the purchaser as well as the seller, the wholesaler as well as the retailer, the employee as well as the employer, and private and governmental research and statistical organizations. The understanding of all these and others who have knowledge of recognized classifications in an industry would

all be relevant in the determination of the question.

A wholesale sale, of course, is not recognized as a retail sale. If an establishment derives more than 25 percent of its annual dollar volume from sales made at wholesale, it clearly cannot qualify as a retail and service establishment. It must be remembered, however, that what is a retail sale for purposes of a sales tax law is not necessarily a retail sale for purposes of the statutory definition of the term "retail or service establishment." Similarly, a showing that sales of goods or services are not wholesale does not necessarily prove that such sales or services are recognized in the particular industry as retail.

The distinction between a retail sale and a wholesale sale is one of fact. Typically, retail sales are made to the general consuming public. The sales are numerous and involve small quantities of goods. Wholesale establishments usually exclude the general consuming public as a matter of established business policy and confine their sales to other wholesalers, retailers, and industrial or business purchasers in quantities greater than are normally sold to the general consuming public at retail. What constitutes a small quantity of goods depends, of course, upon the facts in the particular case and the quantity will vary with different commodities and and in different trades and industries. Thus, a different quantity would be characteristic of retail sales of canned tomato juice, bed sheets, furniture, coal, etc. The quantity test is a well-recognized business concept. There are reasonably definite limits as to the quantity of a particular commodity which the general consuming public regularly purchases at any given time at retail

and businessmen are aware of these buying habits. These buying habits set the standard for the quantity of goods which is recognized in an industry as the subject of a retail sale. Quantities which are materially in excess of such a standard are generally regarded as wholesale and not retail quantities.

The sale of goods in a quantity approximating the quantity involved in a normal wholesale transaction, and as to which a special discount from the normal retail price is given is generally regarded as a wholesale sale in most industries. Whether the sale of such quantity must always involve a discount in order to be considered a wholesale sale depends upon industry practice. If the practice in the general industry is such that a discount from the normal retail price is not regarded in the industry as significant in determining whether the sale of a certain quantity is a wholesale sale, then the question of whether the sale of such a quantity will be considered as a wholesale sale will be determined without reference to the price. In some industries the sale of a small quantity as a discount may also be regarded as a wholesale sale, in which case it will be treated for the purpose of exemption.

The third requirement for qualifying as a retail or service establishment within the term's statutory definition is that 75 percent of the retail or service establishment's annual dollar volume must be derived from sales of goods or services, or both, which are not made for resale. At least three-fourths of the total sales of goods or services measured by the annual dollar volume must not be for resale.

Except with respect to a specific situation regarding certain building materials, the word "resale" is not defined in the Act. The common meaning of "resale" is the act of "selling again." A sale is made for resale where the seller knows or has reasonable cause to believe that the goods or services will be resold, whether in their original form, or in an altered form, or as a part, component or ingredient of another article. Where the goods or services are sold for resale, it does not matter what ultimately happens to such goods or services. Thus, the fact that the goods are consumed by fire or no market is found for them, and are, therefore, never resold does not alter the character of the sale which is made for resale. Similarly, if at the time the sale is made, the seller has no knowledge or reasonable cause to believe that the goods are purchased for the purpose of resale, the fact that the goods later are actually resold is not controlling. In considering whether there is a sale of goods or services and whether such goods or services are sold for resale in any specific situation, the term "sale" includes "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Thus, under the definition, sales by an establishment to a competitor are regarded as sales for resale even though made without profit. Similarly, sales for distribution by the purchaser for business purposes are sales for resale under the "other disposition" language of the definition of "sale" even though distributed at no cost to the ultimate recipient.

APPENDIX B

CONSTITUTION OF UNITED STATES

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fair Labor Standards Act of 1938 as amended

Section 203

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment); wares, products, commodities, merchandise, or articles or subjects of commerce of any

character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(n) "Resale", except as used in subsection (s) (1), shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: Provided, That the sale is recognized as a bona fide retail sale in the industry.

Section 206

Sec. 6. (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates --

(1) not less than $1 an hour.

(b) Every employer shall pay to each of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 3(s) (1), (2), or (4) or by an establishment described in section 3(s) (3) or (5), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this section, or (ii) is brought within the purview of this section by the amendments made to sections 13(a) of this Act by the Fair Labor Standards Amendments of 1961, wages at rates --

Section 207

Sec. 7. (a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; and

(2) No employer shall employ any of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 3(s) (1) or (4), or by an establishment described in section 3(s) (3), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this subsection, or (ii) is brought within the purview of this subsection by the amendments made to section 13 of this Act by the Fair Labor Standards Amendments of 1961 --

(A) for a workweek longer than forty-four hours during the third year from the effective date of the Fair Labor Standards Amendments of 1961,

(B) for a workweek longer than forty-two hours during the fourth year from such date,

(C) for a workweek longer than forty hours after the expiration of the fourth year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 211

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as

necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect. [June 25, 1938, c. 676, § 11, 52 Stat. 1066; 1946 Reorg. Plan No. 2, § 1, 11 F. R. 7873, 60 Stat. 1095; October 26, 1949, c. 736, § 9, 63 Stat. 916; 29 U.S.C. § 211.]

Section 213

Sec. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to --

(2) any employee employed by any retail or service establishment, more than 50 percentum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment --

(i) is not an enterprise described in section 3 (s), or

(ii) is in such an enterprise and is a hotel, motel, restaurant, motion picture theater; or is an amusement or recreational establishment that operates on a seasonal basis, or

(iii) is in such an enterprise and is a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physically or mentally handicapped or gifted children, or

(iv) is in such an enterprise and has an annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000.

1961 Amendment. - Section 9 of P. L. 87-30, approved May 5, 1961, effective September 3, 1961, amended paragraph (2) to read as shown above. Prior to amendment it read as follows:

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or".

Section 215

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this [original] Act, it shall be unlawful for any person --

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order by the Administrator issued under section 14;

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

Section 216

Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

Title 29 Code of Federal Regulations,

Part 776, Labor, Chapter V.
Section 776.2
Title 29 CODE OF FED. REGULATIONS, Part 776
LABOR, Chapter V, Sec. 776.2, 776.3

"[¶ 24,102.02] Sec. 776.2 Employee Basis of Coverage, ---

The coverage of the Act's wage and hour provisions as described in sections 6 and 7 does not deal in a blanket way with industries as a whole. Thus, in section 6, it is provided that every employer shall pay the statutory minimum wage to 'each of his employees who is engaged in commerce or in the production of goods for commerce.' It thus becomes primarily an individual matter as to the nature of the employment of the particular employeee. Some employers in a given industry may have no employees covered by the Act; other employers in the industry may have some employees covered by the Act, and not others; still other employers in the industry may have all their employees within the Act's coverage. If after considering all the relevant

factors, employees are found to be engaged in covered work, their employer cannot avoid his obligations to them under the Act on the ground that he is not 'engaged in commerce or in the production of goods for commerce.' To the extent that his employees are so engaged, he is himself so engaged.

In determining whether an individual employee is within the coverage of the wage and hours provisions, however, the relationship of an employer's business to commerce or to the production of goods for commerce may sometimes be an important indication of the character of the employee's work. It is apparent, too, from the 1949 amendment to the definition of 'produced' and its legislative history that an examination of the character of the employer's business will in some borderline situations be necessary in determining whether the employee's occupation bears the requisite close relationship to production for commerce."

"[¶ 24,102.03] Sec. 776.3 Persons Engaging in Both Covered and Noncovered Activities. --

The Act applies to employees 'engaged in commerce or in the production of goods for commerce' without regard to whether such employees, or their employer, are also engaged in other activities which would not bring them within the coverage of the Act. The Act makes no distinction as to the percentage, volume, or amount of activities of either employee or employer which constitute engaging in commerce or in the production of goods for commerce. Sections 6 and 7 refer to 'each' and 'any' employee so engaged, and Section 15(a) (1) prohibits the introduction into the channels of interstate or foreign

commerce of 'any' goods in the production of which 'any' employee was employed in violation of section 6 or section 7. Although employees doing work in connection with mere isolated, sporadic, or occasional shipments in commerce of insubstantial amounts of goods will not be considered covered by virtue of that fact alone, the law is settled that every employee whose engagement in activities in commerce or in the production of goods for commerce, even though small in amount, is regular and recurring, is covered by the Act. This does not, however, necessarily mean that an employee who at some particular time may engage in work which brings him within the coverage of the Act is, by reason of that fact, thereafter indefinitely entitled to its benefits."

Title 29 Code of Federal Regulations
Chapter V, 516

Section 516.2

[¶ 23,121.02]

"Sec. 516.2* Employees Subject to Minimum Wage or Minimum Wage and Overtime Provisions; Section 6 or Sections 6 and 7 (a) of the Act. -- (a) Items Required. Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each and every employee to whom section 6 or both sections 6 and 7 (a) of the Act apply:

(b) Records of Retroactive Payment of Wages. Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator pursuant to section 16(c) of the Act, shall:

(2) Prepare a report of each such payment on the receipt form provided or authorized by the Wage and Hour Division, and (i) preserve a copy as part of his records, (ii) deliver a copy to the employee, and (iii) file the original, which shall evidence payment by the employer and receipt by the employee, with the Administrator or his authorized representative within 10 days after payment is made."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680	8
Cooper v. *Gas Corp.*, 1 Wage and Hour Cases 1119	7
Dusky v. *United States*, 295 F.2d 743, certiorari denied, 368 U.S. 998	9
Goldberg v. *Fritschy*, 198 F.Supp. 743, reversed *sub nom. Wirtz* v. *Du Mont*, 309 F.2d 152	7
Guess v. *Montague*, 140 F.2d 500	8
Hagan v. *Goldberg*, 291 F.2d 249	8
Holm v. *United States*, 325 F.2d 44	9
Mabee v. *White Plains Pub. Co.*, 327 U.S. 178	7
Mitchell v. *Douglas Auto Parts Co.*, 11 Wage and Hour Cases 807	7
Mitchell v. *Jaffe*, 261 F.2d 883	7
Mitchell v. *Owen*, 292 F.2d 71	8
Rudin v. *United States*, 254 F.2d 45, certiorari denied, 357 U.S. 930	9

Cases—Continued	Page
Tilbury v. *Rogers*, 123 F.Supp. 109, affirmed, 220 F.2d 757, certiorari denied, 350 U.S. 839	7
United States v. *Darby*, 312 U.S. 100	7, 9
United States v. *National Dairy Corp.*, 372 U.S. 29	9
Statutes and rules:	
Fair Labor Standards Act:	
29 U.S.C. 206	6
29 U.S.C. 207	6
29 U.S.C. 213	2
29 U.S.C. 215	3
29 U.S.C. 216	3
29 C.F.R. 779.300-779.398	9

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1095

EDGAR W. DICKENSON, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 353 F. 2d 389.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1965. A petition for rehearing was denied on January 6, 1966. On February 3, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including March 5, 1966, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence showed that petitioner's employees were covered by the Fair Labor Standards Act.

2. Whether the government was required to prove violations for any particular "work week" and failed to do so.

3. Whether the question of petitioner's claimed exemption from the application of the Act under Section 213(a)(2) (exempting a "retail establishment") was properly resolved in the trial court.

4. Whether 29 U.S.C. 213(a)(2) is unconstitutionally vague.

STATUTE INVOLVED

29 U.S.C. 213 provided in pertinent part as follows:

> (a) The provisions of sections 206 and 207 shall not apply with respect to—
>
> * * * *
>
> (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;
>
> * * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of submitting false receipt forms to the Department of Labor (count 1), paying less than the required wages (counts 2 and 3), keeping false and incomplete records (counts 4 and 5) and shipping goods produced by underpaid workers in interstate commerce (count 6), in violation of the Fair Labor Standards Act, 29 U.S.C. 215(a)(1), 215(a)(5) and 216(a) (R.A. 2-8).[1] He was fined $1000 on each of four counts, placed on 6 months' probation, and directed to pay back wages to the employees named in the information (R.A. 68).

During the period in question, petitioner was in the business of receiving and wrecking used automobiles, selling new and used automobile parts, and producing scrap metal from wrecked automobiles in San Diego, California (Tr. 93-95, 300, 550-553). It was stipulated that the scrap metal, which petitioner sold to a scrap dealer, was shipped by that dealer in foreign commerce (Tr. 277-279, 688; Ex. 12).[2] There was testimony that several of the employees named in the information delivered scrap metal or loaded the delivery truck once or twice a week (Tr. 93-95,

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[1] "R.A." refers to the record on appeal which is designated as volume I and is independently paginated. "Tr." refers to the transcript of trial which is paginated consecutively. It constitutes volumes II thru V.

[2] Petitioner testified that the cash volume of scrap sold was $284 in 1959, $145 in 1960 and $84 in 1961 (Tr. 388-89).

160, 166-167, 175-176, 388). Other employees stated they stripped parts from the cars, moved the scrap or guarded it (Tr. 66, 247-248).

1. The evidence relevant to the charge of submitting false receipts showed that petitioner consented to being adjudged in civil contempt in the United States District Court for the Southern District of California for violation of an injunction entered by that court on January 11, 1956, ordering him to refrain from violating the wage provisions of the Fair Labor Standards Act (Tr. 25, 639-40; Ex. 25). The agreed-upon contempt decree ordered petitioner to pay $231.00 to Richard Madrigal, $306.00 to Agapeto Martinez and $202.12 to William Roberts (Tr. 25, 26, 27, 640; Ex. 25). Petitioner subsequently submitted to the Department of Labor their official receipt forms signed by him and allegedly signed by each of the named employees for the stated amounts, less taxes (Tr. 29, 30, 32, 35; Exs. 1, 2, 3). Madrigal testified that he actually received only $8.64 when he signed the receipt (Tr. 64). Martinez stated that he received nothing when he signed the receipt after petitioner, on his way to court, requested that Martinez "help him out" (Tr. 198). Roberts testified that he received no money and that he did not sign the receipt bearing his name (Tr. 47, 49). Roberts stated that he was unable to write at the time of his alleged signing because he was then recovering from a recent stroke (Tr. 48, 296).

Petitioner admitted that he had paid only $8.64 of the $738 agreed upon in the contempt order, but con-

tended that he took valid set-offs for cash advances and loans made to these employees (Tr. 309-314, 386-387, 462-463). Petitioner did not inform the Department of Labor about the extensive deductions until the third visit of a Department investigator, over a year and one-half after the filing of the receipts (Tr. 476-479). On the investigator's initial visit, shortly after the receipts were submitted, petitioner told the investigator that Roberts had cashed his check with him and that Madrigal had been paid the full amount in cash (Tr. 611, 621). Two of the employees acknowledged that they had borrowed money from petitioner but testified that loan repayments were deducted from their salaries each payday (Tr. 53, 65-66). Martinez testified that he had bought several old cars from petitioner but asserted that the amount of his debt as alleged by petitioner was not even approximately correct (Tr. 198-199, 219-221).

2. The evidence relevant to the wage and hour violations revealed that petitioner failed to pay his employees in accordance with the actual time worked. Each of the employees named in the information testified that he worked between 10 and 30 more hours per week than petitioner recorded. The employees were paid for the hours recorded at the rate of $1 per hour and $1.50 per hour overtime (Tr. 105-106, 114-117, 164, 165, 179, 245-246).

3. Petitioner claimed that he was a retailer exempt from the coverage of the Act under Section 213(a)(2) on the ground that at least 75% of his sales were not for resale and were recognized as retail sales in the industry.

Petitioner's California sales tax returns showed that the following percentages of sales were reported as non-taxable (*i.e.*, sales made for resale to a person with a tax-exempt number): 28.6%, 1957; 23.7%, 1958; 28.6%, 1959; 24.1%, 1960; 25.3%, 1961 (Tr. 389-398, 561-562). Petitioner and his expert witness, a professor of marketing, testified that they estimated 15% to 25% of the non-taxable sales were in reality retail sales because they were purchases for personal use by holders of tax-exempt certificates (Tr. 391-392, 419-420). In addition to including this estimated percentage of non-taxable sales in the retail category, petitioner's expert testified that he included all taxable sales without determining whether any of these might in fact have been wholesale (*e.g.*, to a Mexican garage or an industrial purchaser) under his definition of that term (Tr. 429-430, 433-434). A former employee testified that petitioner made sales to nearby Mexican garages, which were charged the sales tax (Tr. 582-583).

ARGUMENT

1. Petitioner contends (Pet. 10-12) that his scrap metal sales amounted to only a *de minimis* portion of his gross sales and that, therefore, his employees were not covered by the Fair Labor Standards Act. The wrecking of cars for scrap was, however, a regular and continuing part of petitioner's business of selling used auto parts from wrecked cars.[3] This Court has pointed

[3] The wage and hour provisions of the Act apply to employees engaged in the "production of goods for commerce" (29 U.S.C. 206, 207). The actual sale of the scrap, which

out that there is no *de minimis* test under the Fair Labor Standards Act when there are regularly recurring sales in interstate commerce because Congress has made no distinction based on volume. See *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178, 181, wherein the Act was applied to a newspaper whose daily circulation of approximately 10,000 included an out-of-state distribution of about 45 papers a day. See also *United States* v. *Darby*, 312 U.S. 100, 123; *Mitchell* v. *Jaffe*, 261 F.2d 883 (C.A. 5); *Tilbury* v. *Rogers*, 123 F.Supp. 109 (W.D. La.), affirmed, 220 F.2d 757 (C.A. 5), certiorari denied, 350 U.S. 839; *Cooper* v. *Gas Corp.*, 1 Wage and Hour Cases 1119, 1122 (Mich. Cir. Ct.).

2. Petitioner's argument (Pet. 12-13) that the government failed to prove the violations by "work week" is without merit. Several employees testified that they hauled scrap *weekly* and that they stripped cars for parts as a regular function of the business (Tr. 93-95, 160, 166-167, 175-176, 388). As we have noted (*supra*, n. 3), this type of activity has been held to be the "production of goods for commerce," and thus within the wage and hour provisions of the Act. Since petitioner's scrap sales were not a separate part of

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employees testified occurred weekly, was only a part of the "production of goods for commerce," under the Act. Employee activity in picking up wrecked cars and stripping them of their reusable parts has consistently been held to be part of the "production of goods for commerce." See, *e.g.*, *Mitchell* v. *Jaffe*, 261 F. 2d 883, 887 (C.A. 5); *Goldberg* v. *Fritschy*, 198 F. Supp. 743, 745 (W.D.N.C.), reversed on other grounds *sub nom. Wirtz* v. *Du Mont*, 309 F. 2d 152 (C.A. 4); *Mitchell* v. *Douglas Auto Parts Co.*, 11 Wage and Hour Cases 807, 809 (N.D. Ill.) (not officially reported).

the business for which his employees were separately paid, the testimony as to the employees' duties combined with the testimony of weekly underpayment was sufficient to prove violations with respect to payments by work week.

In any event, it is well established that when employment has been shown to be covered, as in the instant case, the burden is on the employer to show that the employees were not covered during particular work weeks. See *Hagan* v. *Goldberg*, 291 F. 2d 249, 251 (C.A. 9); *Guess* v. *Montague*, 140 F. 2d 500, 504 (C.A. 4); *Mitchell* v. *Owen*, 292 F. 2d 71, 78-79 (C.A. 6). See also *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680. In the absence of any testimony tending to negate the affirmative proof offered by the government, the jury was clearly justified in finding that petitioner regularly violated the Act. Since the question at issue here was whether petitioner had willfully violated the Act and not the amount due a particular employee in a particular week, proof of systematic violation was clearly sufficient.

3. Petitioner contends that the determination whether he qualified for the retail exemption was improperly treated as a question of fact (Pet. 13-15). But, in this case, that determination depended on a finding as to whether 75% of petitioner's sales were retail; this in turn depended on the jury's evaluation of the credibility of petitioner and his expert witness and an appraisal of the factual premises on which their testimony rested. The jury, which was properly instructed on the meaning of "retail sale," was

free to disregard the expert testimony if it found it to be based upon inadequate or improper examination.[4]

Moreover, petitioner agreed in the trial court that the exemption issue in this case was a question of fact for the jury (Tr. 666, 668). He did not ask the judge to make a ruling on the exemption as a question of law and may not now—after the jury determination to which he agreed produced an unfavorable result—claim the right to such a ruling.

4. That conviction may depend on factual issues and that there may be "borderline" cases does not, as petitioner contends, render the Act with the retail exemption too vague to be the basis of a criminal prosecution. See *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32-33, and cases cited. The statute sets forth a specific definition of the retail exemption which has been supplemented by Department of Labor regulations giving precise definitions and examples of retail establishments. See 29 C.F.R. 779.300-779.398. As this Court stated in *United States* v. *Darby*, 312 U.S. 100, 125-126:

> One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines is warned that he may be subject to the criminal penalties of the Act.

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[4] In the instant case the jury might well have disregarded the expert's testimony because he admitted that he did not examine *any* sale that was taxed (Tr. 429-430, 433-434). See *Rudin* v. *United States*, 254 F. 2d 45 (C.A. 6), certiorari denied, 357 U.S. 930; *Dusky* v. *United States*, 295 F. 2d 743, 754 (C.A. 8), certiorari denied, 368 U.S. 998; *Holm* v. *United States*, 325 F. 2d 44, 46 (C.A. 9).

Petitioner, who conceded the application of the Act to his business in the 1958 contempt order, was well aware that his conduct was proscribed by the Act.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] Petitioner raises but does not argue two additional questions (Pet. 4, questions 5(a) and 5(b)). As to the first, the bona fides of petitioner's set-offs was challenged by each of the employees named in count 1 (see Statement, supra, pp. 4-5). In the second question, petitioner appears to attack the Department's policy of requiring written receipts from employees to attest to the taking of set-offs. But this policy is not properly in issue in the present case because the court instructed the jury that, if the employees acknowledged the set-off of their alleged debts *in any form*, petitioner should be found not guilty on count 1 (Tr. 814).

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